

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

TRANSCRIPT OF PROCEEDINGS

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:
UNITED STATES OF AMERICA, : CRIMINAL ACTION
: NO. 2:14-CR-00113-01
vs. :
: August 5, 2014
JAMES H. EVANS, III, :
: Defendant.
:
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PLEA HEARING

BEFORE THE HONORABLE THOMAS E. JOHNSTON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the United States: MS. MEREDITH GEORGE THOMAS
Assistant U.S. Attorney
300 Virginia Street, East
Charleston, WV 25301

For the Defendant: MR. ROBERT B. KUENZEL
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P.O. Box 607
Chapmanville, WV 25508

Court Reporter: Lisa A. Cook, RPR-RMR-CRR-FCRR

Proceedings recorded by mechanical stenography; transcript produced by computer.

1 P R O C E E D I N G S

2 THE CLERK: The matter before the Court is the
3 *United States vs. James Evans*, Criminal Action Number
4 2:14-CR-00113, scheduled for a plea hearing.

5 THE COURT: Good afternoon. Will counsel please
6 note their appearances.

7 MS. THOMAS: Meredith Thomas on behalf of the
8 United States.

9 MR. KUENZEL: Rob Kuenzel on behalf of the
10 defendant, James Evans, who is also present, Your Honor.

11 THE COURT: Good afternoon.

12 Mr. Evans, would you please stand and I'll ask the
13 deputy clerk to administer an oath to you at this time.

14 (Defendant sworn)

15 THE COURT: You may be seated.

16 MR. KUENZEL: Judge, let me first apologize for
17 being tardy. There was a crash out here on the bridge
18 coming across the river. So, that's why we were late.

19 THE COURT: I understand that. I appreciate that.
20 It happens from time to time.

21 Mr. Evans, do you understand that you're now under oath
22 and you must tell the truth and if you testify falsely, you
23 may face prosecution for perjury or for making a false
24 statement?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: All right. Throughout the course of
2 this hearing, I'm going to be asking you a number of
3 questions and I want to make sure that you and I are
4 communicating clearly. So, if at any time you don't
5 understand a question that I ask or anything else that
6 occurs in this hearing, I want you to feel free to speak up
7 and seek clarification.

8 Also, if at any time you need to confer with your
9 attorney, I'll be pleased to pause the proceedings to allow
10 you to do so.

11 Do you understand all that?

12 THE DEFENDANT: I do, sir.

13 THE COURT: All right. Let me begin by asking you
14 how old are you?

15 THE DEFENDANT: Thirty-nine.

16 THE COURT: Can you briefly describe your
17 educational background?

18 THE DEFENDANT: High school educated.

19 THE COURT: And can you read and write and
20 understand the English language?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Any hesitation about that?

23 THE DEFENDANT: No, sir.

24 THE COURT: All right. Can you briefly describe
25 your work experience?

1 THE DEFENDANT: My -- I work for myself. I own a
2 salvage yard that I once worked for and now own.

3 THE COURT: All right. Have you taken any
4 medicine or drugs or consumed any alcoholic beverages in the
5 last 24 hours?

6 THE DEFENDANT: Yes, sir. I take medicine. I was
7 actually at the hospital last night.

8 THE COURT: Prescription medication?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: And what is that?

11 THE DEFENDANT: I know I've taken some Xanax this
12 morning. And I don't know what they gave me last night.

13 THE COURT: What, what did they give you medicine
14 for last night?

15 THE DEFENDANT: Shortness of breath, a bad
16 headache, just high blood pressure, that kind of stuff.

17 THE COURT: Okay. And you took Xanax this
18 morning?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: All right. Any other prescription
21 medications?

22 THE DEFENDANT: No, sir.

23 THE COURT: To the best of your knowledge, as you
24 sit here today are you suffering from any side effects from
25 any of the medications you've taken that would in any way

1 affect your ability to fully participate in this hearing
2 today?

3 THE DEFENDANT: No, sir.

4 THE COURT: Now, have you ever been treated for
5 any mental illness or addiction to drugs of any kind?

6 THE DEFENDANT: No, sir.

7 THE COURT: Do you know where you are and why
8 you're here today?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Do you have any hearing impairment or
11 other disability which would prevent you from fully
12 participating in this hearing today?

13 THE DEFENDANT: No, sir.

14 THE COURT: Mr. Kuenzel, do you have any reason to
15 question the competence of your client?

16 MR. KUENZEL: No, Your Honor.

17 THE COURT: All right. I believe I've been
18 provided with the original of the plea agreement.

19 Ms. Thomas, is this -- have there been any changes made
20 to the plea agreement since the copy I received earlier?

21 MS. THOMAS: No, Your Honor.

22 THE COURT: All right. Very well.

23 Mr. Evans, is that your signature which appears on the
24 8th and final page of the plea agreement?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: And are those your initials that
2 appear on the other pages of the plea agreement?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: And have you read and reviewed each of
5 the 16 paragraphs of the plea agreement and the two exhibits
6 attached thereto?

7 Let me ask that question again. Have you read and
8 reviewed with your attorney each of the 16 paragraphs of the
9 plea agreement and the exhibit attached to -- the exhibits
10 attached to the plea agreement?

11 THE DEFENDANT: Yes, Your Honor.

12 THE COURT: All right. Just for the record, I
13 would note that there's 17 numbered and one of them -- well,
14 we skipped number 12, so there's actually only 16 paragraphs
15 in the, in the plea agreement.

16 And do you wish to have the various terms of the plea
17 agreement orally stated on the record or do you believe that
18 that's unnecessary?

19 MR. KUENZEL: Judge, we respectfully would waive
20 the reading of the plea agreement.

21 THE COURT: All right. But let me ask the
22 defendant.

23 MR. KUENZEL: Yes, Your Honor.

24 THE COURT: I'll ask you again. Mr. Evans, do you
25 wish to have the various terms of the plea agreement orally

1 stated on the record or do you believe that that's
2 unnecessary?

3 THE DEFENDANT: I think that's unnecessary, Your
4 Honor.

5 THE COURT: All right. And do you understand and
6 agree with all of the terms and provisions contained in the
7 plea agreement?

8 THE DEFENDANT: Yes, Your Honor.

9 THE COURT: All right.

10 Mr. Kuenzel, have you reviewed each of the 16
11 paragraphs of the plea agreement and its exhibits with your
12 client?

13 MR. KUENZEL: I have, Your Honor.

14 THE COURT: And, Mr. Kuenzel and Ms. Thomas, is
15 there any reason why either of you believe that the various
16 terms of the plea agreement should be orally stated on the
17 record?

18 MS. THOMAS: No, Your Honor.

19 MR. KUENZEL: No, Your Honor.

20 THE COURT: All right. Nonetheless, Mr. Evans, I
21 want to talk with you about some of the provisions of the
22 plea agreement beginning with Section 5 which begins on Page
23 2 and runs over on to Page 3 and is entitled "Restitution."

24 And it recites that you agree that you owe restitution
25 to Arch Coal in the amount of \$30,000 with interest. Do you

1 understand that?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: And more to the point, I want to
4 direct your attention to Subsection (e) of Section 5 and
5 that is an appeal waiver. And, first of all, do you
6 understand that a waiver is a legal term that means you're
7 giving something up?

8 THE DEFENDANT: Could you -- I didn't quite
9 understand that, sir.

10 THE COURT: Do you understand that a waiver is a
11 legal term that means you're giving something up?

12 THE DEFENDANT: Yes.

13 THE COURT: Do you understand that?

14 THE DEFENDANT: Yes, yes, Your Honor.

15 THE COURT: All right. So, in Section 5(e) do you
16 understand that you're waiving -- you waive your right to
17 appeal any order of restitution imposed by the Court unless
18 the amount of restitution imposed is more than what is
19 recited in Section 5. Do you understand that waiver?

20 THE DEFENDANT: Yes, Your Honor.

21 THE COURT: All right. Next I want to refer you
22 to Section 10 of the plea agreement which begins on Page 4
23 and runs over on to Page 5 and is entitled "Stipulation of
24 Facts and Waiver of Federal Rule of Evidence 410."

25 Now, this section relates to a couple of different

1 matters, the first of which is the Stipulation of Facts
2 which is attached to the plea agreement as Exhibit B. And I
3 want to turn your attention to that document now.

4 Exhibit B is a three-page document. And on the third
5 page, is that your signature which appears there?

6 THE DEFENDANT: Yes, Your Honor.

7 THE COURT: And have you read the Stipulation of
8 Facts?

9 THE DEFENDANT: Yes, Your Honor.

10 THE COURT: And do you agree that all of the facts
11 contained within the stipulation are true?

12 THE DEFENDANT: Yes, Your Honor.

13 THE COURT: Any hesitation about that?

14 THE DEFENDANT: No, sir.

15 THE COURT: All right. A little bit about what
16 will be happening from here on out. I'll be asking the
17 probation officer to prepare a Pre-Sentence Investigation
18 Report. That report will contain detailed, recommended
19 factual findings regarding this offense and your background,
20 among other things.

21 Ultimately at sentencing I will make factual findings
22 based, at least in part, on the recommendations contained in
23 the Pre-Sentence Report. And you and the Government have
24 reached an agreement regarding certain facts contained in
25 the stipulation, but I want you to understand that in this

1 process, neither the probation officer nor this Court are
2 bound by that Stipulation of Facts.

3 Do you understand that?

4 THE DEFENDANT: Yes, Your Honor.

5 THE COURT: And do you further understand that if
6 I make findings of fact at sentencing that are different
7 from or inconsistent with the facts contained in the
8 stipulation, you will still be bound by your guilty plea and
9 would have no right to withdraw it? Do you understand that?

10 THE DEFENDANT: Yes, Your Honor.

11 THE COURT: All right. The other matter
12 addressed, then, in Section 10 of the plea agreement is a
13 waiver of Federal Rule of Evidence 410.

14 Now, Rule 410 generally provides that information or
15 documents regarding plea negotiations, and this Stipulation
16 of Facts would fall into that category, those things are
17 generally not admissible at trial. In other words, the
18 Government can't use that sort of thing against you at
19 trial.

20 However, under this waiver, if you withdraw from the
21 plea agreement or if it's no longer any good because you
22 violated one or more of its terms and there is a subsequent
23 trial, then the Government under the waiver would be allowed
24 to present the Stipulation of Facts in its case in chief or
25 for other purposes at that trial.

1 Do you understand that waiver?

2 THE DEFENDANT: Yes, sir, yes, Your Honor.

3 THE COURT: All right. Next I want to refer you
4 to Section 11 of the plea agreement which appears on Page 5
5 and is entitled "Agreement on Sentencing Guidelines."

6 Now, before we get into this, I want to ask you, has
7 your attorney talked with you regarding the Federal
8 Sentencing Guidelines and how they generally work?

9 THE DEFENDANT: Yes, Your Honor.

10 THE COURT: And has he shown you that chart in the
11 back of the book?

12 THE DEFENDANT: Yes, Your Honor.

13 THE COURT: All right. Well, working from that
14 chart, I want to have a similar discussion with you.

15 If you'll recall, on the left side of the chart there's
16 a series of numbers that run from low to high as you go down
17 the page, and those are offense levels. And the offense
18 level is calculated by starting at the Base Offense Level,
19 or a starting point. And then that can be adjusted upward
20 or downward depending on the facts and circumstances of the
21 case to arrive at an adjusted offense level. Then
22 consideration is usually given to a reduction for acceptance
23 of responsibility.

24 Has your attorney talked with you about that?

25 THE DEFENDANT: Yes, Your Honor.

1 THE COURT: And then at that point, you generally
2 arrive at a Total Offense Level. Then you go up to the top
3 of the chart and there are six criminal history categories.
4 And you would fall into one of those depending on the number
5 of points, if any, assigned to any prior convictions that
6 you may have.

7 Then you combine the Criminal History Category with the
8 Total Offense Level and arrive at a point in the chart that
9 gives a range of months of imprisonment. Some parts of the
10 chart allow for certain alternatives to imprisonment.

11 Do you understand all these things so far about the
12 guidelines?

13 THE DEFENDANT: Yes, Your Honor.

14 THE COURT: All right. Once we arrive at a range
15 of months of imprisonment, I have the authority to sentence
16 you within that range, or I have the authority to sentence
17 you outside of that range, either above it or below it under
18 certain circumstances.

19 If I do that based on factors identified in the
20 guidelines themselves, that's generally known as a
21 departure. If I sentence you outside the guideline range,
22 again above it or below it, based on factors outside of the
23 guidelines, it's generally known as a variance.

24 Has your attorney explained all these things to you?

25 THE DEFENDANT: Yes, Your Honor.

1 THE COURT: And do you believe that you fully
2 understand all these things that I've told you about the
3 guidelines?

4 THE DEFENDANT: Yes, Your Honor.

5 THE COURT: All right. With that in mind, Section
6 11 contains an agreement you've reached with the Government
7 regarding the guidelines, one or more provisions of the
8 guidelines.

9 Now, this is similar to the Stipulation of Facts in
10 that the Pre-Sentence Report will also include a proposed
11 guideline calculation. And I will make a sentence -- I will
12 make sentencing guideline findings at sentencing based, at
13 least in part, on the recommendations made by the probation
14 officer.

15 So, again, some of the Stipulation of Facts, even
16 though you've reached an agreement with the Government
17 regarding one or more provisions of the guidelines, I want
18 you to understand that in this process neither the probation
19 officer nor this Court are bound by that agreement on the
20 guidelines. Do you understand that?

21 THE DEFENDANT: Yes, Your Honor.

22 THE COURT: And do you further understand that if
23 I make guideline findings at sentencing that are different
24 from or inconsistent with this agreement on the guidelines,
25 you will still be bound by your guilty plea and would have

1 no right to withdraw it? Do you understand that?

2 THE DEFENDANT: Yes, Your Honor.

3 THE COURT: All right. Next I want to refer you
4 to Section 13 of the plea agreement which begins on Page 5
5 and runs over on to Page 6. And it's entitled "Waiver of
6 Appeal and Collateral Attack."

7 Now, this section relates to a couple of different
8 procedures that I want to discuss with you briefly.

9 An appeal is a procedure by which a party to, to a case
10 before a District Court like this one - and in a criminal
11 case, it's often the defendant - goes to the Court of
12 Appeals, or the next level up of the court system, and
13 argues that certain errors or mistakes may have taken place
14 in their criminal case before the District Court.

15 A collateral attack, which is sometimes referred to as
16 a *habeas corpus* petition, is a separate civil case that a
17 defendant may file after their criminal case is over in
18 which they may also argue that certain errors or mistakes
19 may have taken place in their criminal case before the
20 District Court.

21 Now, do you understand those two procedures at least as
22 I've briefly described them to you?

23 THE DEFENDANT: Yes, Your Honor.

24 THE COURT: All right. The other matter I want to
25 talk with you about before we get into Section 12 is that

1 there are two phases to a criminal case. I want to explain
2 those to you.

3 The first one is the phase in which guilt or innocence
4 is determined. Sometimes that's by trial. Much more often
5 it's by a guilty plea like what we're doing today. That
6 phase of the case begins at the very beginning of the case
7 and includes all proceedings up and until that determination
8 is made, such as what we're doing today.

9 The next phase of the case is the penalty phase in
10 which the penalty for the crime is determined, including a
11 sentencing hearing at the conclusion of the case.

12 Now, do you understand the two phases of a criminal
13 case as I've described them to you?

14 THE DEFENDANT: Yes, Your Honor.

15 THE COURT: All right. With all that in mind,
16 then, the first paragraph of Section 13 contains an appeal
17 waiver. I want to go over that with you now. Give me just
18 a moment.

19 (Pause)

20 THE COURT: All right. In that paragraph -- in
21 that first paragraph do you understand you waive your right
22 to appeal your conviction and any sentence of imprisonment,
23 fine, or term of supervised release or the manner in which
24 the sentence was determined on any ground whatsoever with
25 one exception? You may appeal any sentence that is greater

1 than the maximum penalty set forth by statute. Do you
2 understand that waiver?

3 THE DEFENDANT: Yes, Your Honor.

4 THE COURT: Anything about it you don't understand
5 or you have questions about?

6 THE DEFENDANT: No, Your Honor.

7 THE COURT: All right. In the second paragraph of
8 Section 13, then, do you also understand that you may not
9 file a later civil proceeding, sometimes referred to as a
10 collateral attack or a *habeas corpus* petition, challenging
11 your plea, conviction, or sentence? Do you understand that?

12 THE DEFENDANT: Yes, Your Honor.

13 THE COURT: All right. Any questions about that?

14 THE DEFENDANT: No, Your Honor.

15 THE COURT: All right. Finally, do you understand
16 that you are in no event waiving your right to claim
17 ineffective assistance of counsel either on appeal or by
18 collateral attack?

19 THE DEFENDANT: I didn't quite understand that,
20 Your Honor.

21 THE COURT: In spite of these waivers, you are not
22 waiving your right to claim that your counsel was
23 ineffective on appeal or in a collateral attack. Do you
24 understand that?

25 THE DEFENDANT: Yes, Your Honor.

1 THE COURT: All right. Finally, I want to refer
2 you to Section 14 of the plea agreement which is on Page 6
3 and it's entitled "Waiver of FOIA and Privacy Right."

4 Now, this waiver means you can't go back after this
5 case is over and seek documents or other information about
6 the case from the Government even with a Freedom of
7 Information Act request. Do you understand that waiver?

8 THE DEFENDANT: Yes, Your Honor.

9 THE COURT: Mr. Kuenzel, have you thoroughly
10 reviewed the plea agreement with your client?

11 MR. KUENZEL: I have, Your Honor.

12 THE COURT: Do you believe that he fully
13 understands the various terms and provisions of the plea
14 agreement, including the waivers and other matters that I've
15 gone over with him this afternoon?

16 MR. KUENZEL: I do, Your Honor.

17 THE COURT: And, Mr. Evans, have you reviewed the
18 plea agreement in detail with your attorney?

19 THE DEFENDANT: Yes, Your Honor.

20 THE COURT: Do you believe that you've had
21 adequate time to discuss your case fully with your attorney?

22 THE DEFENDANT: Yes, Your Honor.

23 THE COURT: Has your attorney answered any
24 questions that you've had about your case?

25 THE DEFENDANT: Yes, Your Honor.

1 THE COURT: And, Mr. Kuenzel, during your
2 representation of the defendant, has he been cooperative?

3 MR. KUENZEL: He has, Your Honor.

4 THE COURT: Mr. Evans, has anything further been
5 agreed to either orally or in writing that is not contained
6 in the plea agreement?

7 THE DEFENDANT: No, Your Honor.

8 THE COURT: All right. I'll order that the plea
9 agreement be filed. I'll find that the defendant
10 understands and agrees with the terms contained in the plea
11 agreement. I will defer accepting or rejecting the plea
12 agreement until sentencing after the Pre-Sentence Report has
13 been received and considered.

14 Now, Mr. Evans, have you received and read and reviewed
15 with your attorney a copy of the information, or charging
16 document, in this case?

17 THE DEFENDANT: Yes, Your Honor.

18 THE COURT: And do you understand the charge
19 contained in the information?

20 THE DEFENDANT: Yes, Your Honor.

21 THE COURT: Would you like me to read the
22 information to you or will you waive the reading of the
23 information?

24 THE DEFENDANT: I'll waive the reading of the
25 information, sir.

1 THE COURT: All right. As I understand it, you'll
2 be pleading guilty to a single-count information which
3 charges you with conspiracy to defraud Arch Coal of its
4 right to the honest services of its employee in violation of
5 18, U.S.C., Section 371. And I want to go over that statute
6 and that charge with you in just a little bit more detail.

7 Section 371 provides in pertinent part that if two or
8 more persons conspire either to commit any offense against
9 the United States, or any agency thereof, and one or more of
10 such persons do any act to effect the object of the
11 conspiracy, each shall be guilty of a crime against the
12 United States.

13 Now, you're charged with conspiring to violate 18,
14 U.S.C., Section 1341, which is the mail fraud statute, and
15 Section 1346.

16 And Section 1341 provides in pertinent part that
17 whoever, having devised or intending to devise any scheme or
18 artifice to defraud, or for obtaining money or property by
19 means of false or fraudulent pretenses, representations, or
20 promises, for the purpose of executing such scheme or
21 artifice or attempting so to do, places in any post office
22 or authorized depository for mail matter, any matter or
23 thing whatever to be sent or delivered by the Postal
24 Service, or deposits or causes to be deposited any matter or
25 thing whatever to be sent or delivered by any private or

1 commercial interstate carrier, or takes or receives
2 therefrom, any such matter or thing, or knowingly causes to
3 be delivered by mail or such carrier according to the
4 direction thereon, or at a place at which it is directed to
5 be delivered by the person to whom it is addressed, any such
6 matter or thing, shall be guilty of a crime against the
7 United States.

8 Now, Section 1346 provides in pertinent part that the
9 phrase "any scheme or artifice to defraud" includes any
10 scheme or artifice to deprive another of the intangible
11 right of honest services.

12 Now, in order to prove this charge, the Government
13 would have to prove each of the following elements beyond a
14 reasonable doubt:

15 And they are, first, that there was a conspiracy to
16 defraud Arch Coal of its right to the honest services of its
17 employee; and, second, the conspiracy was entered into by
18 two or more persons; and, third, at some time during the
19 conspiracy, a member of the conspiracy knowingly performed
20 one of the overt acts charged in the information in order to
21 advance the purpose of the conspiracy; and, finally, at some
22 time during the conspiracy, you knew the purpose of the
23 conspiracy and then deliberately joined the conspiracy.

24 Now, I want to share with you some definitions that
25 apply to what I've just told you.

1 A criminal conspiracy is an agreement or a mutual
2 understanding knowingly made or knowingly entered into by at
3 least two people to violate the law by some joint or common
4 plan or course of action.

5 An overt act means some type of outward, objective
6 action performed by one of the parties to or one of the
7 members of the agreement or conspiracy which evidences that
8 agreement.

9 The phrase "any scheme or artifice to defraud" means
10 any deliberate plan of action or course of conduct by which
11 someone intends to deceive or to cheat another or by which
12 someone intends to deprive another of something of value.

13 In the context of the facts of this case, the phrase "a
14 scheme or artifice to deprive another of the intangible
15 right of honest services" means that you, as a vendor doing
16 business with Arch Coal, Inc., knew that Arch's employee,
17 identified in the information as Known Person Three, owed
18 his employer, Arch Coal, a duty of fiduciary -- or a
19 fiduciary duty of loyalty; that you intended that he breach
20 that duty by failing to disclose material matters; and that
21 you foresaw or reasonably should have foreseen that Arch
22 Coal might suffer an economic harm as a result of the
23 breach.

24 The phrase "false or fraudulent pretenses,
25 representations, omissions, or promises" means a statement,

1 an assertion, or omission which concerns a material or
2 important fact or a material or important aspect of the
3 matter in question.

4 A false representation or promise is one that was
5 either known to be untrue at the time that it was made or
6 used, or that it was made or used with reckless indifference
7 as to whether it was, in fact, true or false, and made or
8 used with the intent to defraud.

9 An "intent to defraud" means to act knowingly and with
10 the intention or the purpose to deceive or to cheat. An
11 intent to defraud is accompanied, ordinarily, by a desire or
12 a purpose to bring about some gain or benefit to oneself or
13 some other person or by a desire or a purpose to cause some
14 loss to some person.

15 The phrase "use of the mails" means that the mails
16 were, in fact, used in some manner to further, or to
17 advance, or to carry out the scheme to defraud or scheme to
18 obtain money or property by false or fraudulent pretenses,
19 representations, omissions, or promises or deprive Arch Coal
20 of its intangible right to its employee's honest services.

21 An act is done knowingly if done voluntarily and
22 intentionally and not because of mistake or accident or
23 other innocent reason.

24 An act is done intentionally if it is done deliberately
25 and not by accident.

1 Any objections to the elements as I've described them?

2 MS. THOMAS: No, Your Honor.

3 MR. KUENZEL: No, Your Honor.

4 THE COURT: All right. Next I want to go over
5 with you, Mr. Evans, the maximum and any minimum sentences
6 you may face as a result of your plea. And that is a
7 maximum term of imprisonment of five years; a maximum fine
8 of \$250,000, or twice the gross pecuniary gain or loss
9 resulting from your conduct, whichever is greater; and a
10 maximum term of supervised release of three years. A
11 mandatory special assessment of \$100 would be required.
12 Restitution could also be ordered if it was -- appeared to
13 be applicable, as it appears it may be in this case.

14 Next I want to return to our discussion of the Federal
15 Sentencing Guidelines. They are advisory, meaning they're
16 not mandatory or don't have to be followed but they'll,
17 nevertheless, play an important role in your case from here
18 on out.

19 This Court will consider the factors set forth in 18,
20 U.S.C., Section 3553(a), including the advisory guidelines,
21 in determining the appropriate sentence in your case.

22 I now want to ask you some questions that will help me
23 understand your understanding of the advisory guidelines.
24 Have you discussed with your attorney the various factors
25 which apply in determining what the sentence in your case

1 may be under the advisory guidelines?

2 THE DEFENDANT: Yes, Your Honor.

3 THE COURT: And do you understand that on this
4 information you cannot, in any event, receive a greater
5 sentence than the statutory maximum that I explained to you
6 a moment ago?

7 THE DEFENDANT: Yes, Your Honor.

8 THE COURT: Do you understand that the Court will
9 not determine the sentence for your case until a later date
10 when a Pre-Sentence Report has been completed and both you
11 and the Government have had an opportunity to challenge the
12 facts and analysis reported by the probation officer?

13 THE DEFENDANT: Yes, Your Honor.

14 THE COURT: Do you also understand that under a
15 concept known as relevant conduct this Court, in determining
16 the Total Offense Level for sentencing purposes under the
17 guidelines, may take into account any conduct,
18 circumstances, or injuries relevant to the crime of which
19 you may be convicted?

20 THE DEFENDANT: Yes, Your Honor.

21 THE COURT: Do you understand that after the Court
22 has determined what advisory guidelines apply to your case,
23 the Court has the authority to vary or depart from the
24 advisory guidelines and impose a sentence that is more
25 severe or less severe than the sentence called for by the

1 guidelines?

2 THE DEFENDANT: Yes, Your Honor.

3 THE COURT: Do you understand, then, in
4 determining your sentence, the Court is obligated to
5 calculate the applicable sentencing guideline range and to
6 consider that range, possible departures under the
7 guidelines, and other sentencing factors under 18, U.S.C.,
8 Section 3553(a)?

9 THE DEFENDANT: Yes, Your Honor.

10 THE COURT: Do you understand that parole has been
11 abolished and if you're sentenced to prison, you'll not be
12 released on parole?

13 THE DEFENDANT: Yes, Your Honor.

14 THE COURT: Do you understand if the Court accepts
15 your plea of guilty and the sentence ultimately imposed upon
16 you is more severe than you had hoped for or expected, you
17 will still be bound by your guilty plea and would have no
18 right to withdraw it?

19 THE DEFENDANT: Yes, Your Honor.

20 THE COURT: Do you understand if you plead guilty
21 to this single-count information which charges you with a
22 felony, you may lose important civil rights such as the
23 right to vote, the right to serve on a jury, the right to
24 hold public office, and the right to own or possess a
25 firearm?

1 THE DEFENDANT: Yes, Your Honor.

2 THE COURT: All right. Mr. Evans, you have the
3 right to have the charge contained in the information
4 presented to a federal grand jury. And I want to explain
5 that process to you.

6 A grand jury is composed of at least 16 and not more
7 than 23 persons, and at least 12 grand jurors must find that
8 there is probable cause to believe that you committed the
9 crime with which you are charged before you may be indicted.

10 Now, do you see any benefit to you of having this case
11 presented to a federal grand jury?

12 THE DEFENDANT: No, Your Honor.

13 THE COURT: Do you see any disadvantage or
14 prejudice to you of not having the case presented to a grand
15 jury?

16 THE DEFENDANT: No, Your Honor.

17 THE COURT: All right. Your counsel has been
18 provided with a Waiver of Indictment form. I want to go
19 over that with you now.

20 It contains what we call the style of the case, *United*
21 *States of America vs. James H. Evans, III*, the Criminal
22 Action Number, and it's entitled "Waiver of Indictment" and
23 it states as follows:

24 "I, James H. Evans, III, am accused of violating 18,
25 U.S.C., Section 371. I have been advised of the nature of

1 the charges, of the proposed information, and of my rights.
2 I hereby waive in open court prosecution by indictment and
3 consent that the proceeding may be by information rather
4 than by indictment."

5 And there's a space for you to sign and date, a space
6 for counsel to sign, and a space for me to sign.

7 Now, do you understand what I just read to you?

8 THE DEFENDANT: Yes, Your Honor.

9 THE COURT: Anything about the waiver of
10 indictment and procedure that you don't understand or you
11 have questions about?

12 THE DEFENDANT: No, Your Honor.

13 THE COURT: All right. If you're prepared to do
14 so, then I'll ask that you sign and date the Waiver of
15 Indictment form. I'll ask your counsel to sign it and
16 tender it to the Court.

17 (Pause)

18 MR. KUENZEL: May I approach?

19 THE COURT: You may.

20 All right. I'll note for the record that the defendant
21 has signed and dated the Waiver of Indictment form. It has
22 been endorsed by his counsel. I am now signing it and I'll
23 order that it be made a part of the record for this
24 proceeding.

25 Next, Mr. Evans, I want to talk with you regarding your

1 trial and constitutional rights.

2 You have the right to plead not guilty and maintain a
3 not guilty plea throughout these proceedings, including at
4 trial.

5 You have the right to be represented by counsel.

6 You have the right to a speedy and public trial by a
7 jury composed of citizens of this district.

8 You have the right to confront and have an attorney
9 cross-examine witnesses and have your attorney move to
10 suppress any evidence he believes was illegally or
11 unconstitutionally obtained.

12 You have the right not to testify or otherwise
13 incriminate yourself and your exercise of this right cannot
14 be held against you.

15 Do you understand these rights so far?

16 THE DEFENDANT: Yes, Your Honor.

17 THE COURT: You have the right to have the
18 Government come in here and prove its case beyond a
19 reasonable doubt. The jury's verdict would have to be
20 unanimous.

21 You have the right to present evidence on your own
22 behalf. You have the right to testify on your own behalf at
23 trial. And you have the right to subpoena witnesses to
24 testify for you.

25 Do you understand all these rights?

1 THE DEFENDANT: Yes, Your Honor.

2 THE COURT: Any of them you don't understand or
3 you have questions about?

4 THE DEFENDANT: No, Your Honor.

5 THE COURT: Other than your right to counsel, do
6 you understand that you'll be giving up all these rights by
7 entering a plea of guilty?

8 THE DEFENDANT: Yes, Your Honor.

9 THE COURT: Do you understand that once you've
10 entered a plea of guilty, there's not going to be any trial
11 and no jury verdict and no finding of innocence or guilt
12 based on disputed evidence presented to me or to a jury?

13 THE DEFENDANT: Yes, Your Honor.

14 THE COURT: Do you believe that you fully
15 understand the consequences of entering a plea of guilty?

16 THE DEFENDANT: Yes, Your Honor.

17 THE COURT: Mr. Kuenzel, having reviewed this case
18 and the plea agreement in detail with your client, do you
19 believe that the defendant fully understands his rights and
20 fully understands the consequences of entering a plea of
21 guilty?

22 MR. KUENZEL: Yes, Your Honor, I do.

23 THE COURT: All right. I note that there is a
24 Stipulation of Facts. Does counsel have any objection to
25 the Court considering the Stipulation of Facts in its

1 consideration of the factual basis for the plea?

2 MS. THOMAS: No objection.

3 MR. KUENZEL: No, Your Honor.

4 THE COURT: All right. Very well. I would say
5 that having looked at the law and the facts in this case
6 the -- you all might want to in your sentencing memoranda
7 address -- or maybe before then address the factual basis.
8 I'm certainly going to defer a factual basis finding. This
9 seems somewhat complicated. And I'm pretty sure I'm going
10 to want to hear from the parties on that.

11 Matter of fact, why don't we do this. Why don't you
12 all file anything on that two weeks in advance of
13 sentencing. That way, it would be separate from the
14 sentencing memos.

15 All right. Mr. Evans, will you please stand.

16 As to the charge contained in the single-count
17 information, how do you plead, sir? Guilty or not guilty?

18 THE DEFENDANT: Guilty, Your Honor.

19 THE COURT: You may be seated.

20 Your counsel has been provided with a written Plea of
21 Guilty form. I would ask that you go over that with him if
22 necessary. Sign and date it. Then I'll ask him to sign it
23 and tender it to the Court.

24 (Pause)

25 MR. KUENZEL: May I approach?

1 THE COURT: You may.

2 All right. I'll note for the record that the defendant
3 has signed and dated the written plea of guilty form. It
4 has been witnessed by his counsel. And I will order that it
5 be made a part of the record for this proceeding.

6 Mr. Evans, is this plea the result of any threat or
7 coercion or harassment of you by anyone?

8 THE DEFENDANT: No, Your Honor.

9 THE COURT: Is it the result of any promise or
10 inducement other than those contained in the plea agreement?

11 THE DEFENDANT: No, Your Honor.

12 THE COURT: Are you pleading guilty to protect
13 anyone?

14 THE DEFENDANT: No, Your Honor.

15 THE COURT: Are you acting voluntarily and of your
16 own free will in entering this guilty plea?

17 THE DEFENDANT: Yes, Your Honor.

18 THE COURT: Has anyone promised or predicted the
19 exact sentence which will be imposed in your case?

20 THE DEFENDANT: No, Your Honor.

21 THE COURT: Do you understand no one could know at
22 this time the exact sentence which will be imposed?

23 THE DEFENDANT: Yes, Your Honor.

24 THE COURT: Has your attorney adequately
25 represented you in this matter?

1 THE DEFENDANT: Yes, Your Honor.

2 THE COURT: Has your attorney left anything undone
3 that you think should have been done?

4 THE DEFENDANT: No, Your Honor.

5 THE COURT: Have you or your attorney found any
6 defense to the charge contained in the information?

7 THE DEFENDANT: No, Your Honor.

8 THE COURT: Are you, in fact, guilty of the crime
9 charged in the information? In other words, did you do it?

10 THE DEFENDANT: Yes, Your Honor.

11 THE COURT: All right. I'll find the defendant's
12 competent and capable of entering an informed plea; that the
13 plea is freely and voluntarily made; that the defendant
14 understands the nature of the charges and is aware of the
15 consequences of the plea. I will find that the defendant
16 understands his rights and understands that he's giving up
17 these rights by entering a plea of guilty.

18 I will find that -- I will defer a factual basis
19 finding, but I will accept the plea of guilty to the
20 information and will defer adjudging the defendant guilty
21 until the time of sentencing.

22 I will ask the probation officer to prepare a
23 Pre-Sentence Investigation Report.

24 Mr. Evans, it's important that you cooperate fully with
25 the probation officer in the preparation of the Pre-Sentence

1 Report. If you fail to cooperate fully and truthfully with
2 the probation officer, you could be subject to enhancement
3 of your sentence or the forfeiture of certain sentence
4 reductions for which you might otherwise be eligible.

5 It's also important that you not commit any additional
6 crimes between now and sentencing as there may be additional
7 punishments imposed for committing additional crimes.

8 I'm going to set this matter for sentencing on
9 November 17th, 2014, at 2:00 p.m. And I'll put my other
10 pre-sentence dates in my post-plea order.

11 What's the Government's position with regard to bond?

12 MS. THOMAS: No objection.

13 THE COURT: All right. I will allow the defendant
14 to be released today on a ten-thousand-dollar unsecured bond
15 under the standard conditions and those identified in the
16 Pre-Trial Services order.

17 I've already signed my part of that paperwork.

18 Mr. Kuenzel, you and your client just need to get with
19 the deputy clerk after the hearing to make sure your part of
20 the paperwork is completed.

21 Two notes I want to make about that. One is that, Mr.
22 Evans, you're going to need to surrender your passport. And
23 you're also going to need to get rid of your guns. So, that
24 needs to be done immediately if it hasn't been done already.

25 THE DEFENDANT: I've already taken care of that,

1 Your Honor.

2 THE COURT: Very well. Anything else we need to
3 take care of today?

4 MS. THOMAS: No, Your Honor.

5 MR. KUENZEL: No, Your Honor.

6 THE COURT: All right. Thank you.

7 (Proceedings concluded at 4:00 p.m.)

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1 I, Lisa A. Cook, Official Reporter of the United
2 States District Court for the Southern District of West
3 Virginia, do hereby certify that the foregoing is a true and
4 correct transcript, to the best of my ability, from the
5 record of proceedings in the above-entitled matter.

6

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s\Lisa A. Cook

August 6, 2014

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Reporter

Date

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